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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 235

SANGAMON VALLEY TELEVISION CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, WMAY-TV INCORPORATED, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., AND PLAINS TELEVISION CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not been officially reported, and is printed as an appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Federal Communications Commission violate section 307(b) of the Communications Act, as construed and applied by this Court in the cases of *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, and *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, when it removed the only VHF television channel assigned to Springfield, Illinois, and assigned it instead to St. Louis, Missouri, which already had four VHF channels?

2. May the Federal Communications Commission validly substitute a concept of "competitive equality" among television channel allocations in selected communities in place of the statutory requirement of section 307(b) of the Communications Act that broadcast frequencies shall be so distributed "among the several States and communities as to provide a fair, efficient, and equitable distribution" of service to each of them?

STATUTE INVOLVED

This case involves section 307(b) of the Communications Act,[1] which reads as follows:

> "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission *shall make* such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." (Emphasis added.)

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[1] Act of June 19, 1934, c. 652, § 307(b), 48 STAT. 1084, as amended by Act of June 5, 1936, c. 5, § 2, 49 STAT. 1475, 47 U.S.C. § 307(b).

STATEMENT OF THE CASE

This case involves the validity of an order of the Federal Communications Commission adopted on February 26, 1957. The order amended section 3.606 of the Commission's Rules and Regulations in such a manner as to make VHF television channel 2 no longer available for use in Springfield, Illinois, and assigned it instead for use in St. Louis, Missouri. Two UHF channels (26 and 36) were substituted for VHF channel 2 in Springfield. The United States Court of Appeals for the District of Columbia Circuit affirmed this action on May 1, 1958.

Unlike its practice (and that of its predecessor, the Federal Radio Commission) in the AM or standard radio broadcasting field, the Commission has dealt with television allocation problems by the exercise of its rule making function rather than by adjudication. In other words, instead of permitting an applicant to apply for any television channel which may be feasible in a given area, the Commission has assigned specific channels to specific communities through the exercise of its rule making powers. Application may only be made for a channel which has been so allocated, with the selection of the best applicant for such a channel subsequently being determined by adjudicatory process pursuant to section 309(b) of the Communications Act, 47 U.S.C. § 309(b).

Through the year 1948, television broadcasting, although used commercially, was still in an experimental or developmental stage. Many engineering facts concerning coverage and interference matters were unknown, and no attempt had been made to establish a comprehensive and detailed nationwide allocation plan.

Confronted with this situation and an ever-increasing demand for the use of frequencies for television broadcasting, the Commission, on September 29, 1948, imposed a "freeze" on all further construction of new television broadcast stations.[2] This freeze was continued in effect until 1952. On April 14th of that year the Commission released its so-called "Sixth Report and Order," in which a detailed and comprehensive nationwide television allocation plan was promulgated.[3]

As pertinent here, the Commission's Sixth Report and Order did two basic things. First, it reassigned certain of the VHF channels which were then in use and provided for the future use of VHF channels at specified locations in accordance with fixed mileage and frequency separations. It also, for the first time, authorized the commercial use of UHF channels. These similarly were assigned to specific communities in accordance with a schedule of mileage and frequency separations. While at that time the advantages of VHF over UHF had not been demonstrated in actual operation to the point which is true today, it was then well known that certain advantages did exist in the VHF band as regards coverage, economies of operation, and potential receiver audience.

The very high frequency (VHF) television band includes VHF channels numbered 2 through 13. The ultra high frequency (UHF) band includes channels numbered 14 through 83. However, the VHF and UHF television bands are not adjacent in the frequency spectrum. VHF channels are found between 54 and 216 megacycles, while the UHF range is from

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[2] 13 FED. REG. 5182 (1948); *see* 1 PIKE & FISCHER RADIO REG. 91:535, 91:536 (1951).

[3] 1 PIKE & FISCHER RADIO REG. 91:601—1112.

470 to 890 megacycles. Thus a large gap of 254 megacycles exists between the highest VHF channel (13) and the lowest UHF channel (14). This gap causes significant engineering differences between the two types of frequencies. Experience since the 1952 allocation has conclusively demonstrated the superiority of VHF over UHF channels to the point where UHF assignments are virtually no longer sought by applicants before the Commission; where scores of previously existing UHF stations have abandoned operation; and where even the national networks, which sought to encourage UHF by their ownership and use of such stations, have been compelled to recognize their unsuitability for present use.

Simply stated, VHF permits a better coverage of a much larger area at a lower cost than UHF. Further, every set sold in the United States is capable of receiving VHF signals; only a very small percentage are equipped to receive UHF signals.[4] Of the 533 pres-

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[4] The present chairman of the Commission stated in 1956 that:

> "A VHF service presently is superior to a UHF. In comparison with UHF, a VHF signal has a wider coverage and less shadow area. Both in operation and reception, VHF is less costly. To ignore these differences in the present stage of the development of broadcasting is to disregard the specialized knowledge of this Commission and the experience of the industry and the public." 13 PIKE & FISCHER RADIO REG. 1571, 1594 (1956) (in a dissenting opinion, on a subject not treated by the majority).

Similarly, on page 106 of the *23d Annual Report of the Federal Communications Commission to Congress* (1957), the Commission attributed the lack of a truly competitive nationwide television service to:

> "... the overwhelmingly large number of VHF-only receivers being manufactured and used, the disparity in performance between UHF and VHF transmitting equipment up to the present time, and the preference of program and revenue sources for VHF over UHF outlets."

ently existing television stations, 445 are VHF stations and only 88 are UHF staitons.[5] This is true despite the fact that there are roughly 2½ times as many UHF channels allocated throughout the country as VHF channels.[6] VHF channels in desirable areas have been and are in great demand, while UHF channels have been and are available virtually anywhere simply for the asking. The difference between them was stated succinctly in a recent opinion of the United States Court of Appeals for the District of Columbia Circuit, where VHF channels were labelled as "superior" and UHF channels as "inferior."[7]

When the Commission adopted the basic television allocation structure in its Sixth Report, it specifically concluded that it "shou'd disperse both VHF and UHF widely among states and communities."[8] The "intermixture" of both VHF and UHF channels in certain communities thus was a basic principle of the Sixth Report; the assignment of *only* VHF channels or *only* UHF channels to particular communities ("deintermixture") was specifically rejected as contrary to the public interest. Further, since VHF channels can cover considerably larger areas than UHF channels,

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[5] *Television Digest*, Addenda 26-x to 1958 *Television Factbook*, July 12, 1958.

[6] There are 1519 UHF channels allocated throughout the nation, 171 of which are reserved for non-commercial educational use; only 619 VHF channels have been allocated, with 76 of them designated as educational. See 1958 *Television Factbook*, pp. 396-402, listing allocations as established by section 3.606 of the FCC Rules and Regulations, 1 PIKE & FISCHER RADIO REG. 53:602—620b.

[7] *WIRL Television Co.* v. *United States*, 253 F.2d 863, 866 (D. C. Cir. 1958).

[8] 1 PIKE & FISCHER RADIO REG. at 91:663.

making it desirable to put VHF channels where there are broad areas of common interest, "the 12 VHF channels were distributed as broadly as possible."[9]

Illinois is the nation's fourth most populous state. Its 1950 census population was 8,712,176, with an average of 158.8 persons per square mile. The population of Missouri was only 3,954,653, with only 57.1 persons per square mile. Despite these population differences, the Commission's Sixth Report and Order assigned Missouri 17 VHF channels and Illinois only 11. Springfield, the capital of Illinois, was assigned one VHF channel[10] (2) and one commercial UHF channel (20).[11] St. Louis, Missouri, was assigned four VHF channels, with channel 9 being reserved for an educational station, and channels 4, 5, and 11 available for commercial use. UHF channels 30, 36, and 42 were also assigned to St. Louis.[12] The following chart re-

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[9] *Id.* at 91:621.

[10] Petitioner Sangamon Valley Television Corporation had been an applicant for a VHF channel in Springfield prior to the Sixth Report and Order, and amended its application thereafter to specify channel 2. Application for this same facility subsequently was made by respondent WMAY-TV Incorporated, resulting in an extended comparative hearing which was not concluded until June 27, 1956. (11 PIKE & FISCHER RADIO REG. 783.) An appeal involving the right to operate on channel 2 in Springfield is now pending in the United States Court of Appeals for the District of Columbia Circuit (Case No. 13,991). However, since channel 2 was removed from Springfield by the action here involved, that appeal is in a postponed status pending this Court's disposition of the instant petition for writ of certiorari.

[11] Pars. 514 and 546 of Sixth Report and Order, 1 PIKE & FISCHER RADIO REG. at 91:806-807 and 91:821.

[12] Pars. 521(d) and 524 of Sixth Report and Order, 1 PIKE & FISCHER RADIO REG. at 91:810 and 91:814.

flects the relevant facts as regards populations, channel allocations, applicants, and permittees immediately prior to the removal of channel 2 from Springfield to St. Louis:

	Illinois	Missouri
Population:	8,712,176	3,954,653
Population per sq. mile:	158.8	57.1
No. of VHF Channels:	10	17
	Springfield	St. Louis
Population:	81,628	856,796

Television channels:

VHF channel 2, applied for by petitioner Sangamon Valley Television Corporation and respondent WMAY-TV Incorporated.

UHF channel 20, on which respondent Plains Television Corporation has operated WICS (TV) since September 1953.

UHF channel 66, reserved for educational use, unclaimed.

VHF channel 4, on which KWK-TV had been operated since July, 1954.

VHF channel 5, on which KSD-TV had been operated since February, 1947.

VHF channel 9, on which educational station KETC had been operated since September, 1954.

VHF channel 11, which was then involved in a four-party comparative hearing; is now in use.

UHF channel 30, use of which has been granted to Plaza Radio & TV Co.

UHF channel 36, on which respondent Signal Hill Telecasting Corporation had operated station KTVI(TV) since April, 1955.

UHF channel 42, use of which has been granted to Wistenn, Inc.

On March 30, 1955, respondent Plains Television Corporation, which was operating a UHF station in Springfield, filed a petition with the Commission requesting the institution of a rule making proceeding to move channel 2 from Springfield to St. Louis. On November 10, 1955, the Commission denied that petition and others of a similar vein on the ground that "it would be neither appropriate nor feasible to approach the problem on the basis of separate, individual petitions designed to alleviate conditions in an individual community or a limited area, through departure from the present structure of channel assignments."[13]

On that same day (November 10, 1955), the Commission instituted another rule making proceeding to consider nationwide television allocation problems.[14] That proceeding culminated in the adoption of the Second Report on Deintermixture on June 25, 1956. In it, the Commission concluded that deintermixture (making the channels allocated to a given area either all VHF or all UHF) was not sufficiently practicable in enough communities to offer any help to UHF on a nationwide basis.[15] But, in direct contradiction of its earlier conclusion, the Commission decided that "interim steps" should be taken in certain selected communities throughout the country with a new goal of improving "the opportunities for effective competition among a greater number of stations."[16]

The instant case thus was born. The Commission issued its notice of proposed rule making on that date

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[13] 13 PIKE & FISCHER RADIO REG. 1522, 1525 (1955).

[14] 20 FED. REG. 8501 (1955).

[15] 13 PIKE & FISCHER RADIO REG. 1571, 1576 (1956).

[16] *Id.* at 1581.

(June 25, 1956), proposing to move VHF channel 2 from Springfield to St. Louis, and add UHF channel 39 as a substitute in the Illinois capital. (J.A. 1-2, R. 1-2.) Subsequently, the Commission modified the proposal somewhat to include adding UHF channel 26 to Springfield (J.A. 3-4, R. 4-5), and to add UHF channel 36 to Springfield instead of UHF channel 39.[17] (J.A. 30-32, R. 97-98.)

On February 26, 1957, the Commission by a 4 to 2 vote adopted the action of which review is here sought. It so amended section 3.606 of its Rules and Regulations as to move channel 2 from Springfield to St. Louis, where it was given to respondent Signal Hill Telecasting Corporation, and assigned instead two additional UHF channels to the Illinois capital. (J.A. 183-209, R. 679-695.) Springfield thus was deprived of its only VHF television channel so that St. Louis could have its fifth; Missouri was given its 18th VHF channel, leaving Illinois with but ten. For the first time in the history of television, the only VHF chan-

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[17] The Commission never proposed to put channel 2 in Terre Haute, Indiana, as well as in St. Louis. Two months after the proceeding began, the Springfield UHF operator (respondent Plains) filed a petition to amend the notice of proposed rule making to consider adding channel 2 to Terre Haute also (J.A. 21-26, R. 25-30). (If channel 2 were removed from Springfield and added to St. Louis, it could also fit into Terre Haute.) The Commission denied this petition on November 1, 1956, but considered Plains' request as a counter proposal. (J.A. 33-34, R. 109.) Terre Haute was almost entirely ignored by the parties in their pleadings. Ultimately, the Commission did add channel 2 to Terre Haute in its action, giving that Indiana city of only 64,214 its second VHF assignment. However, channel 2's assignment to Terre Haute was little more than a footnote to the entire proceeding, and was purely incidental to the move of channel 2 from Springfield to St. Louis.

nel assigned to one major city was taken away and given to a UHF operator in another city in another state, to foster the competitive positions of two existing stations. In explanation of this action, the Commission stated that "the deletion of channel 2 from the Springfield area will enhance the opportunities for more effective competition among a greater number of stations"—a test or standard which appears nowhere in the Communications Act. (J.A. 199, R. 689.)

In its decision the Commission made no reference whatsoever to the populations of the states of Illinois and Missouri, nor to the number of VHF channels previously assigned to them. It made no reference to the population of Springfield. It made no finding whatsoever that St. Louis had a greater need for a fifth VHF channel than Springfield had for its first, nor did the Commission make any finding that Missouri needed its 18th VHF allocation, leaving Illinois with but 10. In no way did the Commission explain how its action could satisfy the requirement of section 307(b) that frequencies be allocated in such a way as to result in a fair, efficient, and equitable distribution of broadcast service to each of the several states and communities.

Petitioner Sangamon subsequently filed a petition for rehearing based upon section 307(b). (J.A. 210-19, R. 719-26.) It was denied (along with other petitions for rehearing) on June 20, 1957, again by a 4 to 2 vote of the Commission. (J.A. 240-56, R. 1103-12.)

On July 3, 1957, petitioner Sangamon filed a petition for review of such action in the United States Court of Appeals for the District of Columbia Circuit, pursuant to section 402(a) of the Communications

Act,[18] which incorporates by reference the Judicial Review Act of 1950.[19]

The sole question presented by the petition for review, which was briefed and argued by agreement of all of the parties, was: "Did the Federal Communications Commission act contrary to the provisions of section 307(b) of the Communications Act, in the circumstances of this case, when it deleted the only VHF television channel which had been assigned to Springfield, Illinois, and assigned it instead to St. Louis, Missouri, and Terre Haute, Indiana?"

The case was decided by the court of appeals only two weeks after oral argument. The court wrote simply a one paragraph per curiam opinion, in which no reference was made to the requirements of section 307(b) nor was any attempt made to decide that the Commission's action was in compliance with section 307(b). Moreover, the court made no reference to the *Nelson Brothers* and *Allentown* decisions of this Court in which the language of section 307(b) has been construed and applied to basically similar situations.[20]

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[18] Act of June 19, 1934, c. 652, § 402, 48 STAT. 1093, as amended, 63 STAT. 108, as amended, 66 STAT. 718, 47 U.S.C. § 402(a).

[19] Act of December 29, 1950, c. 1189, §§ 1-12, 64 STAT. 1129-32, as amended, 68 STAT. 961, 5 U.S.C. §§ 1031-42.

[20] In fairness, it should be noted that the court of appeals literally has been besieged by appeals from UHF operators which, unlike the respondents here, were unsuccessful in their efforts to stave off competition from superior VHF stations. In each of those cases, the court of appeals affirmed Commission action which held that the right of the public to superior VHF service was paramount to the UHF operators' competitive self-interests, and that UHF operators could not prevent the use of VHF channels in areas to which they long had been assigned. *E.g., Springfield Television*

REASONS FOR ALLOWANCE OF THE WRIT

1. The Commission did not even attempt to apply the mandate of section 307(b) to this case, although the applicability of section 307(b) must, under the decisions of this Court, be determined at the outset of a frequency allocation matter.

2. The action depriving Springfield of its only superior VHF assignment in order to move it to St. Louis, which already had four VHF channels, and giving Missouri its 18th VHF channel at the expense of Illinois which now has only 10, is a clear violation of section 307(b)'s requirement that frequencies be so allocated as to result in a fair, efficient, and equitable distribution of service to each of the several states and communities.

3. The Commission's action was taken in direct contradiction of the *Allentown* and *Nelson Brothers* decisions of this Court, in that the Commission made no findings whatsoever as to the relative needs of the communities and states involved for a frequency which only one could have.

4. The Commission's action was taken solely (and admittedly) to enhance the competitive positions of certain existing UHF station operators, a purpose found nowhere in the Communications Act and con-

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Broadcasting Corp. v. *FCC*, U.S. Ct. of App. for D.C. Cir., Case No. 14,050 (June 19, 1958); *Jacksonville Journal Co. FCC*, 101 U.S. App. D.C. 12, 246 F.2d 699 (1957); *Gerico Investment Co.* v. *United States*, 99 U.S. App. D.C. 379, 240 F.2d 410 (1957); *Coastal Bend Television Co.* v. *FCC*, 98 U.S. App. D.C. 251, 234 F.2d 686 (1956); *Van Curler Broadcasting Corp.* v. *United States*, 98 U.S. App. D.C. 432, 236 F.2d 727, *cert. denied*, 352 U.S. 935 (1956). Although a totally different question was presented by this case, the court of appeals may have believed incorrectly that this was another such matter.

trary to this Court's decision in the case of *FCC* v. *Sanders Brothers Radio Station,* 309 U.S. 470 (1940).

This case is the first one in which the Commission has ever deprived a major city of its only superior VHF channel and given it—for purely competitive reasons—to an operator in another city in another state. However, the Commission's action apparently presages a whole new course of conduct, without regard to the specific limitation on Commission discretion which was established by Congress in enacting section 307(b). On the same day that the Commission acted in this case, it removed the only superior VHF channel from Peoria, Illinois, moving it to Davenport-Rock Island-Moline, Illinois, to protect existing UHF stations in Peoria.[21] (The channel was not given to anyone in Moline; there are now eight applicants for it.) The Commission also removed the only VHF channel from Evansville, Indiana,[22] and Fresno, California[23]—again solely to help the competitive positions of UHF station operators in those areas.[24]

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[21] 22 F.C.C. 342 (1957). The deintermixture of Peoria was affirmed by the United States Court of Appeals for the District of Columbia Circuit in *WIRL Television Co.* v. *United States, supra* note 7. The court's opinion in that case did not refer to section 307(b) at all. It is understood that a petition for writ of certiorari will be filed in that case.

[22] 22 F.C.C. 382 (1957).

[23] 22 F.C.C. 365 (1957).

[24] Stations are still on the air on the sole VHF channels which were allocated to Evansville and Fresno. Since the channels were in use when the Commission decided to remove them, show cause proceedings were necessary under section 316 of the Communications Act, 47 U.S.C. § 316, before the operating authorizations of the licensees could be changed. Those proceedings are now pending.

Today there are some 274 intermixed communities in the United States—communities to which both VHF and UHF channels have been assigned.[25] Petitioner is informed that at this very time the Commission is actively considering deintermixture in over 20 more cities in the United States, with competitive factors only being considered and with section 307(b) being disregarded. Moreover, an authoritative trade publication recently reported that:

> "At its June 9, [1958] session, the FCC specifically considered . . . the proposal of Comr. Frederick W. Ford that the FCC move ahead on its selective deintermixture program geared toward making *all* intermixed markets either all vhf or all uhf."[26] (Emphasis added.)

Whether section 307(b) will be read out of the Communications Act as regards television channel allocations in numerous communities throughout the United States, under the Commission's new concept of "competitive equality," depends entirely upon this Court's disposition of this case.

Like any young and dynamic industry, television has many problems. One problem is the sphere of network-station relationships. Dean Roscoe L. Barrow of the University of Cincinnati Law School headed a special staff which recently completed an extensive network study. While that study took some two years to

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[25] 1958 *Television Factbook*, pp. 388-395, listing allocations as established by section 3.606 of the FCC Rules and Regulations, 1 PIKE & FISCHER RADIO REG. 53:602-620b.

[26] *Broadcasting*, June 23, 1958, p. 56.

complete and resulted in a 737 page report,[27] nonetheless Dean Barrow recently stated: "Unquestionably, the greatest problem in broadcasting is that of [television channel] allocations."[28]

That problem continues, and will continue. It is unquestioned that where VHF stations and UHF stations compete in the same area, UHF stations suffer competitive disadvantages. This is a normal, proper, and continuing by-product of VHF's superiority, just as excellence in any field enjoys a competitive advantage over comparative inferiority. It may well be that an answer should be found to encourage the development of UHF stations—but whatever answer is found cannot be violative of the Communications Act. As long as VHF channels are available, and as long as they are allocated throughout the nation, they must be allocated fairly and equitably among the several states and communities. Section 307(b) is mandatory; it unequivocally provides that the Commission *shall make* such a distribution of frequencies.

Yet today the Commission is on the threshold of removing superior VHF channels from many other communities, without regard for the requirements of section 307(b) and solely for the purpose of equalizing competition. The illegality of this has been lucidly expressed by no less than the present Chairman of the FCC. It was in 1956 that the Commission adopted its Second Report on Deintermixture, culminating a general rule making proceeding on allocation problems. In it, the Commission decided to consider deintermixture in certain communities—including Springfield. *Despite its length, however, the Report contains no reference whatsoever to the effect or applicability of*

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[27] H. R. REP. No. 1297, 85th Cong., 2d Sess. (1958).

[28] *Television Digest*, July 12, 1958, p. 6.

section 307(b) on the deintermixture of a community. The majority's total disregard of the statutory mandate compelled the present Chairman of the FCC to dissent. In pertinent part he stated:

> "The Federal Communications Act provides that the distribution of frequencies among the several states and communities shall be upon a fair, efficient and equitable basis. *It makes no provision for a 'nation-wide competitive system.'* Admittedly ample competition, *if attainable without doing violence to the equitable and efficient provisions of the Act,* would be in the public interest. But when this is to be accomplished at the expense of denying a first television service to substantial numbers of people, it is *tantamount to displacing the Congressional mandate of an efficient and equitable distribution and substituting therefor equal competitive facilities for a few applicants.*
>
> *"To assign only UHF frequencies to some communities when a VHF service is available, is in my opinion, inequitable.* A VHF service presently is superior to a UHF. * * * To ignore these differences in the present stage of the development of broadcasting is to disregard the specialized knowledge of this Commission and the experience of the industry and the public."[29] (Emphasis added.)

The importance of the question involved here—whether the Commission can and will ignore section 307(b) and substitute therefor an allocation standard not set forth in the Act—is further evidenced by Congressional interest in the problem. On May 26, 1958, Stephen J. Angland, an attorney for the current Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce of the House of

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[29] 13 PIKE & FISCHER RADIO REG. 1571, 1594 (1956); see also note 4, *supra.*

Representatives, testified before the Subcommittee. The following colloquy occurred between Mr. Angland and Congressman Peter F. Mack, Jr., with regard to this very case:

> Mr. Mack: "The very purpose of our investigation is to see if laws have been repealed by the independent agencies, to see whether they are abiding by the law as passed by Congress, or whether they are establishing their own rules notwithstanding the laws passed by Congress. You remember that in the Federal Communications law that the Congress expressed a desire to have equitable consideration in all areas and that it was the intent of Congress not to discriminate against any state, any individual, any municipality, or any group of individuals, is that correct?"
>
> Mr. Angland: "Yes, sir."
>
> Mr. Mack: "As a matter of fact, are they not discriminating against the people in this particular area where they have deintermixed? Are they not discriminating against these people by giving them inferior service in this area?"
>
> Mr. Angland: "I think so. This [Springfield] is the capital of one of our large states. It is an important city."
>
> Mr. Mack: "I inquired about this matter the other day. I think it is alarming and *as yet* it has only affected one state and one area within that state, but I am very concerned about the situation there and I believe that this committee should make a thorough investigation and, in my opinion, they should reconsider the channel 2 allocation on this basis alone."
>
> * * *
>
> Mr. Mack: "The deintermixture question is the important one as far as I am concerned, because I believe that *that is probably the first instance where we have run across a gross violation of the*

basic law by the Federal Communications Commission."[30] (Emphasis added.)

This Court twice before has examined the language of section 307(b). Both of its decisions have been squarely contradicted by the Commission action of which review is here sought.

The first case was that of *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266 (1933), which stressed the paramount importance of the requirement of section 307(b).[31] In that case, a party in Gary, Indiana applied for a radio frequency which was then being shared by two stations in Chicago, Illinois. Comparing the populations of the two states and the amount of broadcast services which had been allocated to the respective cities and states, it was apparent that Indiana had less than its fair and equitable share of frequencies, while Illinois had more. Accordingly, the Commission granted the application, taking the frequency away from the two existing stations and putting it in Gary where there was a greater need for it.

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[30] Pages 623-625 of the Transcript of the Hearings of the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, May 26, 1958 (not yet officially printed).

[31] The *Nelson Brothers* case was decided while the Davis Amendment (since repealed) to section 9 of the Radio Act (45 STAT. 373) was in force. Nonetheless, the case is squarely in point. The unique feature of the Davis Amendment was that the United States was divided into five zones for allocation purposes, with a fair and equitable allocation of service being required within each zone. Since the two cities and states involved in the *Nelson Brothers* case were in the same zone, the statute created the same standard as the present section 307(b) establishes on a nationwide basis.

This Court upheld the Commission's action, unanimously reversing the court of appeals. Said the Court (289 U.S. at 283):

> "The concern of the Congress was with the interests of the people,—that they might have a reasonable equality of opportunity in radio transmission and reception, and this involved an equitable distribution not only as between zones but as between States as well."

This Court interpreted section 307(b) more recently in the case of *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). In that case, which closely parallels this one factually, applicants from the respective cities of Easton and Allentown in Pennsylvania each sought a frequency which only one could have. Easton had only one existing station, while Allentown had three. Although Allentown was several times larger than Easton, it was ruled that Easton's need for a second local outlet was greater than Allentown's need for a fourth station. This Court held that when applicants from different communities seek the same frequency, *the first and paramount question which the Commission must answer is: Which community has the greater need for the service? Only after that section 307(b) question has been answered* can the Commission consider the relative merits of the applicants.[32]

---

[32] See also *Courier Post Publishing Co.* v. *FCC*, 70 U.S. App. D.C. 80, 104 F.2d 213 (1939). The Commission had acted in the Easton-Allentown situation though adjudication, while the action of which review is here sought was taken through rule making. However, this distinction has no bearing on the legal question presented. The Commission, of course, "may allocate channels among communities either by passing upon specific applications or by way of rule making," *Logansport Broadcasting Corp.* v.

The holding of the *Allentown* case acquires even greater significance here, for channel 2 was moved not only from one community to another, but from one state to another.

In this case the Commission made no findings whatsoever as to whether Springfield or St. Louis, or Illinois or Missouri, had the greater need for channel 2. Moreover, it made no findings as to the populations of the two states or of Springfield, and it made no findings as to the number of VHF channels assigned to the two states. The "fair and equitable" distribution of service required by section 307(b) could only have been satisfied by leaving channel 2 in Springfield. Yet the Commission deprived the Illinois capital of its only wide-coverage VHF channel to give St. Louis its fifth; it gave Missouri—with less than half the population of Illinois—its 18th VHF channel, leaving Illinois with only 10. A more glaring violation of section 307(b) could scarcely be imagined.

As the rationale of its decision, the Commission concluded simply that "the deletion of Channel 2 from the Springfield area will enhance the opportunities for more effective competition among a greater number of stations." (J.A. 199, R. 689.) However, the Communications Act contains no language whatsoever which would indicate any Congressional intent that there be "competitive equality" among stations in a given area.

When Congress enacted the Communications Act, it easily could have decreed that all broadcast stations in

---

United States, 93 U.S. App. D.C. 342, 345, 210 F.2d 24, 27 (1954), and the mandate of section 307(b) applies with equal force regardless of the method pursued.

a given community must be "competitively equal." It chose not to; to the contrary, as this Court stressed in the *Sanders* case, ". . . the Act recognizes that the field of broadcasting is one of free competition."[33] Further:

> "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."[34]

In fact, the language of section 307(b) expressly negatives any concept of "competitive equality," for it requires that service be distributed fairly, efficiently, and equitably *among* the several states and communities, rather than *within* them. Consider the standard broadcast (AM radio) band. No one has ever contended that there must be competitive equality within any community. In Washington, D. C., for example, the radio stations range from WOL's 250 watts to WTOP's 50,000 watts. Washington thus has a fair and equitable share of superior radio services as well as of poorer ones, with each fulfilling a different community need.

Clearly section 307(b) requires a fair and equitable distribution of superior frequencies as well as of inferior ones. As long as the superior VHF channels are assigned throughout the country, they *must* be assigned fairly and equitably in compliance with section 307(b). The Commission cannot validly assign

---

[33] *FCC* v. *Sanders Brothers Radio Station, supra,* 309 U.S. at 474.

[34] *Id.* at 475.

them fairly and equitably everywhere in the country except in Springfield and Peoria and certain other selected cities, and assign only UHF channels to those communities so that UHF stations in them need not have to compete against a superior VHF station. It must be borne in mind that the public interest is paramount in the administration of the Communications Act; section 307(b) exists for the specific purpose of ensuring that the public of each community and state receives its fair and equitable share of service. The rights of the public of Springfield and Illinois to their fair shares of superior VHF service cannot validly be subordinated to the competitive interests of a few UHF station operators.

CONCLUSION

In its *Allentown* decision, *supra,* this Court observed that: "Fairness to communities is furthered by a recognition of local needs for a community radio mouthpiece."[35] The instant case presents a classic example of this concept. Springfield is the centrally located capital of the nation's fourth most populous state. It is the center of a vast political, economic, and cultural area of broad common interests. In urgently requesting that this Court review this case, we close by quoting from a pleading filed with the Commission in this proceeding by the State of Illinois, through its Attorney General:

> "[P]resent UHF frequencies are entirely inadequate to telecast news, events, programs, interviews and other activities emanating from the city of Springfield, due to the location there of the State Government, the Court and the Illinois State Fair, to the number of Illinois residents that Chan-

[35] 349 U.S. at 362.

nel 2, with its VHF range, could reach; nor will the allocation of additional UHF frequencies to Springfield remedy the situation.

"Accordingly, it is submitted that the allocation of VHF Channel 2 to Springfield, Illinois, is a fair, equitable and necessary assignment of that channel, and the public interest of the people of the state in the activities and events of the city of Springfield, due to the fact of the seat of the government, courts and Illinois State Fair there, require that such broadcast by television should be extended to as many of the people of the state as possible; and *it would appear patently unreasonable and inequitable to allocate another VHF channel from the city of Springfield to the city of St. Louis to the loss and detriment of the people of Illinois within VHF range of the city of Springfield.*" (J.A. 167-68, R. 638-39; emphasis added.)

WHEREFORE, since the Commission's action in moving VHF channel 2 from Springfield to St. Louis was violative of section 307(b) of the Communications Act, and further was in contravention of the decisions of this Court in the *Nelson Brothers, Allentown,* and *Sanders* cases, *supra,* it is respectfully prayed that the instant petition for writ of certiorari be granted.

Respectfully submitted,

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July 30, 1958

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13992

SANGAMON VALLEY TELEVISION CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., WMAY-TV, INC.,

SIGNAL HILL TELECASTING CORPORATION,

PLAINS TELEVISION CORPORATION,
Intervenors

Petition for Review of a Decision and Order of the Federal Communications Commission

---

Decided May 1, 1958

Mr. Stanley S. Harris, with whom *Messrs. D. M. Patrick* and *Lester Cohen* were on the brief, for petitioner.

Mr. John J. O'Malley, Jr., Counsel, Federal Communications Commission, with whom *Messrs. Warren E. Baker,* General Counsel, Federal Communications Commission, *Richard A. Solomon,* Assistant General Counsel, Federal Communications Commission, and *Daniel M. Friedman,* Attorney, Department of Justice, were on the brief, for respondents.

Mr. Vernon L. Wilkinson, with whom *Mr. James A. McKenna, Jr.,* was on the briefs, submitted on the briefs for intervenors American Broadcasting-Paramount Theatres, Inc., and Plains Television Corporation.

Mr. Stanley S. Neustadt, with whom *Messrs. Marcus Cohn* and *Paul Dobin* were on the brief, submitted on the brief for intervenor WMAY-TV, Inc.

Messrs. Monroe Oppenheimer, William P. Bernton and *James H. Heller* were on the brief for intervenor Signal Hill Telecasting Corporation. *Abraham J. Harris* also entered an appearance for intervenor Signal Hill Telecasting Corporation.

Before EDGERTON, *Chief Judge,* and FAHY and BASTIAN, *Circuit Judges.*

PER CURIAM: Petitioner seeks review of a rule-making decision of the Federal Communications Commission resulting in amendment of the Table of Television Channel Assignment. The amendment assigned VHF Channel 2, Springfield, Illinois, to St. Louis, Missouri, and Terre Haute, Indiana, accompanied with the assignment of UHF Channels 26 and 36 to Springfield.

Petitioner, applicant for Channel 2 at Springfield, attacks the decision as illegal because inconsistent with section 307(b) of the Communications Act.[1]

We are unable to sustain this attack. Upon the basis of a full hearing the Commission weighed the various factors involved and reached a reasoned decision within its competence. We find nothing, arbitrary, capricious or otherwise illegal in the decision, and it accordingly is

Affirmed.

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[1] This section reads as follows:

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

48 Stat. 1083 (1934), as amended, 47 U.S.C. § 307(b) (1952).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 235

SANGAMON VALLEY TELEVISION CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, WMAY-TV INCORPORATED, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., and PLAINS TELEVISION CORPORATION, *Respondents.*

BRIEF OF INTERVENOR SIGNAL HILL TELECASTING CORPORATION IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

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BRIEF OF INTERVENOR SIGNAL HILL TELECASTING CORPORATION IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

OPINIONS BELOW

The per curiam opinion of the Court of Appeals is reported at 255 F. 2d 191. The earlier opinion of the Court of Appeals in the closely related case of *WIRL Television Company* v. *United States* is reported at 253 F. 2d 863.

QUESTION PRESENTED

Did the Court below err in holding that the Federal Communications Commission had not acted in violation of Section 307(b) of the Communications Act of 1934, but had "weighed the various factors involved and reached a reasoned decision within its competence," when it determined (1) that the public interest in obtaining a maximum number of television stations would be better served by giving Springfield, Illinois, four technically equal UHF channels, rather than one superior VHF channel and two inferior UHF channels, and (2) that the VHF channel thus deleted from Springfield should be assigned to Terre Haute, Indiana, which already had one VHF commercial channel and to St. Louis, Missouri, which already had three VHF commercial channels and one educational VHF channel?

STATUTE INVOLVED

Section 307(b) of the Communications Act is correctly quoted by petitioner at page 2 of its petition.

COUNTER-STATEMENT OF THE CASE

This case involves a rule-making order of the Federal Communications Commission issued March 1, 1957. The order accomplished the "deintermixture" of Springfield, Illinois, by allocating to that city four technically equal UHF channels in lieu of one technically superior VHF channel and two UHF channels. On the same day, similar orders were issued deintermixing a number of other areas (*infra*, f.n. 3).

Background of the Deintermixture Orders

The background for these orders was succinctly stated by the Court below, in its decision approving the Peoria order, as follows:[1]

> The separate rule-making proceedings which led to the removal of Channel 8 from Peoria [and Channel 2 from Springfield] were held in response to a nationwide problem concerning UHF television in general . . . In 1952 UHF was believed to have a healthy future and many communities were "intermixed", that is, allotted both UHF and VHF channels, so as to encourage the development of UHF television. It was thought that UHF and VHF could compete effectively with each other. As time passed, however, UHF did not progress as rapidly as had been hoped, and in many "intermixed" areas UHF televisers were in straits, because the audiences, networks and advertisers preferred the superior VHF outlets.
>
> In response to this problem the Commission in 1955 began proceedings to consider the feasibility of "deintermixture", *i.e.*, making all channels in any one area either VHF or UHF, but not an intermixture of both. . . .
>
> On June 26, 1956, the Commission proposed to explore the possibilities of shifting all or most television broadcasting to the UHF band. The Commission added:
>
> > "Since some years would be required in any event for the full implementation of an all-UHF system, the Commission believes that steps should be taken in the meantime to improve the opportunities for effective competition among a greater number of stations.

[1] *WIRL Television Co.* v. *United States*, 253 F. 2d 863, 865.

> As already indicated, a basic choice in many markets at this time lies between the elimination of VHF channel assignments to create improved opportunities for UHF broadcasting and, alternatively, the assignment of additional local VHF channels."

Consequently, an "interim" proceeding was begun, involving 13 communities, in nine of which (including Peoria [and Springfield]) it was proposed to delete the existing VHF allocations. . . .[2]

---

[2] The criteria to govern these interim proceedings were set forth in detail in the Commission's June 26, 1956 order (21 Fed. Reg. 4958, 13 Pike & Fischer RR 1571).

These were "in markets with one or more commercial VHF assignments, the merits of proposals to eliminate a VHF commercial assignment would depend to a large extent on such factors as:

"1. Whether significant numbers of people would lack service as a result of the elimination of the VHF channel.
"2. Whether one or more UHF stations are operating in the area.
"3. Whether a reasonably high proportion of the sets in use can receive UHF signals.
"4. Whether the terrain is reasonably favorable for UHF coverage.
"5. Whether, taking into account all the local circumstances, the elimination of a VHF channel would be consistent with the objective of improving the opportunities for effective competition among a greater number of stations.

"The desirability of assigning a first VHF channel or of adding an additional VHF channel would depend principally upon:

"1. Whether it is possible to locate the new transmitter so as to meet minimum transmitter spacings.
"2. Whether, in cases where it is necessary to move the channel from another city, there is greater need for the channel in the area to which it is proposed to be assigned.
"3. Whether the addition of a new VHF assignment would be consistent with the objective of improving the opportunities for effective competition among a greater number of stations."

The Springfield Order

One of the thirteen communities thus selected by the Commission for rule-making proceedings, to determine whether deintermixture would meet the criteria of the June 26, 1957 order, was Springfield, situated in the flat central area of Illinois. In its order, the Commission (Docket No. 11747) proposed to deintermix both Springfield, Illinois and St. Louis, Missouri, by removing Channel 2 from Springfield and substituting two UHF channels (thus making that market all-UHF) and assigning Channel 2 to St. Louis, Missouri (thus adding a fourth commercial VHF channel to a community destined to become all-VHF). Later the Commission announced it would consider the possibility of assigning Channel 2 not only to St. Louis but also to Terre Haute, Indiana, which already had only VHF service. On March 1, 1957, the Commission issued its findings and orders in a number of these rule-making proceedings, among which were orders deintermixing Springfield, Illinois (22 F.C.C. 318), and five other areas.[3]

In each case the Commission made detailed findings that the area in question met the five criteria spelled

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[3] These were Elmira, N. Y. (22 F. C. C. 307), Peoria, Ill. (22 F. C. C. 342), Fresno, Cal. (22 F. C. C. 365), Evansville and Hatfield, Ind. (22 F. C. C. 382), and Albany, Schenectady, Troy, N. Y. (22 F. C. C. 293). Later, the Commission modified the Albany, Schenectady, Troy order so as to accomplish deintermixture by adding another VHF channel rather than deleting the already assigned VHF channels, thus making the market all-VHF rather than all-UHF. (15 Pike & Fischer R. R. 1514a). The rationale of the two orders was, however, the same, namely, the incompatibility in the same market of an intermixture of UHF and VHF operations.

out in the June 26, 1956 order (supra footnote 2). In the Springfield order, it found (R. 689) that "the area is now predominantly UHF, the terrain is satisfactory for UHF propagation, the vast majority of sets in the area are capable of receiving UHF transmissions, and a number of UHF stations are actually engaged in providing service to the public"; that "additional UHF channels . . . are available for assignment to this area, and we are convinced that UHF can provide satisfactory service here"; that "while multiple UHF stations will be able to compete effectively in this market, there is great danger that the addition of a VHF channel would destroy effective competition (R. 689)". For all these reasons, it was concluded that "the deletion of Channel 2 from the Springfield area will enhance the opportunities for more effective competition among a greater number of stations (R. 689)".

The Commission then considered in what communities Channel 2 could best be utilized, upon its deletion from Springfield, and concluded that its assignment to St. Louis, Missouri, and Terre Haute, Indiana, was to be preferred to the alternative proposals for either Salem, Missouri, and Salem, Illinois, or Cape Girardeau, Missouri (R. 689, 690).

In the Court below, on petition for review from the Springfield order, petitioner claimed, as it does here, that the Commission's action violated Section 307(b) of the Communications Act of 1934. Per curiam, that court held that it was "unable to sustain this attack" (255 F. 2d 191), and this petition for certiorari followed.

REASONS FOR DENYING THE WRIT

1. The Court below correctly held that it was not "arbitrary, capricious or otherwise illegal" for the Commission to give Springfield four technically equal UHF channels, all of which could compete against each other, rather than two technically equal UHF channels with a single VHF channel, operations on which would drastically impair service on the UHF channels. On this phase of its decision, the Court's remarks in its Peoria opinion apply equally to Springfield:[4]

> The long range goal of the Commission was to encourage UHF, and removal of potential VHF competition is a rational choice of means to achieve this goal. The short range, or "interim" goal, was to "improve the opportunities for effective competition among a greater number of stations." It was not arbitrary to conclude that the goal would be better approached in Peoria [and Springfield] by allotting it four technically equal UHF channels, rather than one superior VHF channel and two inferior UHF channels. *WIRL Television Company* v. *United States*, supra, 253 F. 2d 863, 866.

2. Nor did the Court err in holding that the Commission's order did not violate Section 307(b). This

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[4] Petitioner complains that the Court below rendered its decision "only two weeks after oral argument," and wrote simply a "one paragraph per curiam opinion." But the Court had only recently considered at some length the related and essentially identical Peoria order, *WIRL Television Company* v. *United States*, supra. Indeed, at the oral argument below, petitioner's Counsel conceded that the Peoria decision, if correct, was controlling. A per curiam opinion was therefore quite appropriate and the petitioner's suggestion in footnote 20 of its petition that the Court of Appeals was confused as to the issues before it is utterly groundless.

section requires the Commission so to distribute radio facilities as to provide a "fair, efficient and equitable distribution of *service*" to the several states and communities. It does not require that there be an identical distribution of *each type of frequency within a service,* regardless of the effect of such distribution upon the actual service that would be made available. Under the far more restrictive language of the statute as then in force, requiring "a fair and equitable allocation of licenses, wave lengths, time for operation and station power to each of the states, . . . within each zone, according to population," this Court held that the Commission had broad discretion in balancing the various types of stations in each state and that "it cannot be said that this demanded equality between states with respect to every *type* of station." *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 281. (Emphasis supplied).[5]

Here, the Commission found that to retain the assignment of a VHF facility in Springfield in addition to the UHF facilities, would result in less,

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[5] In its 1952 Sixth Report and Order, embracing the concept of intermixture of UHF and VHF in the same communities, the Commission, citing *Nelson Brothers*, rejected the contention that it was *required* by law to allocate VHF separately to each community (1 Pike & Fischer RR 91:661):

> *We must, however, reject the contention of the parties that Section 307(b) requires the Commission to treat VHF channels as completely different from UHF channels in making an Assignment Table.* We think it clear that the fair, efficient and equitable distribution required by the Communications Act has reference to over-all distribution within any given radio service and not with respect to every *type* of station within a service. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, at 281. (Emphasis supplied).

rather than more, actual service. For the Commission had found (and the petitioner did not deny) that the advent of a station on VHF Channel 2 in this community would impair UHF operations. Nothing in Section 307(b) required the Commission to blink these facts and to foist upon Springfield unitary VHF service in place of multiple UHF service.

3. Nor is there basis for petitioner's claim that, in following the mandate of Section 307(b), the Commission could not prefer, for Springfield and the other deintermixed areas, "effective competition among a greater number" of UHF stations rather than VHF monopolies. For the Commission's concern under Section 307(b) properly encompasses, as this Court has stated, "a recognition of local needs for a community radio mouthpiece. The distribution of a second license to a community *in order to secure local competition for originating and broadcasting programs* appears to us to be likewise within the allowable area of discretion." *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 362 (Emphasis supplied). Here, the Commission sought to assure that Springfield and the various other areas being deintermixed not only had television service but "local competition" within that service. This was plainly within that "allowable area of discretion" which this Court found implicit in Section 307(b).

4. Having thus determined to deintermix Springfield by deleting VHF Channel 2 and substituting two more UHF channels, the Commission similarly acted within its "allowable area of discretion" in reassigning the channel for use in St. Louis, Missouri, and Terre Haute, Indiana. These cities had become almost

as predominantly VHF areas as Peoria and Springfield had become UHF areas, and assigning an additional VHF channel to each of these cities was found by the Commission to meet all the criteria set forth in its June 27, 1956 order. (R. 685 et seq.)[6] The enhanced opportunities thus provided for "effective competition among a greater number of stations" in St. Louis and Terre Haute were properly considered by the Commission under the rationale of the *Allentown* case, supra.

5. We submit, therefore, that the Court below properly found that the order appealed from did not violate the mandate of Section 307(b) of the Communications Act, and that the Commission had "weighed the various factors involved and reached a reasoned conclusion within its competence."

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[6] As already noted, other parties had urged that, if deleted from Springfield, channel 2 be assigned to Cape Girardeau, Missouri, or to Salem, Missouri and Salem, Illinois, rather than to St. Louis and Terre Haute. The Commission considered these alternatives at length but concluded it would be more in the public interest to assign the channel to St. Louis and Terre Haute (R. 689, 690). Petitioner does not challenge this decision.

CONCLUSION

For the reasons stated it is submitted that the petition for writ of certiorari should be denied.

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October Term, 1958

SANGAMON VALLEY TELEVISION CORPORATION, *Petitioner*,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, WMAY-TV, INCORPORATED, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., AND PLAINS TELEVISION CORPORATION, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1958

No. 235

SANGAMON VALLEY TELEVISION CORPORATION, *Petitioner*,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, WMAY-TV, INCORPORATED, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., AND PLAINS TELEVISION CORPORATION, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-2a) is reported at 255 F.2d 191. The Report and Order of the Federal Communications Commission there affirmed is reported in 22 FCC Reports 318 (1957), *sub nom. Television Allocations in Springfield, Ill.-St. Louis, Mo. Areas* (J.A. 183-209).

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1958. The petition for certiorari was filed on July 30, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the action of the Federal Communications Commission, deleting VHF Channel 2 and substituting UHF channels therefor in Springfield, Ill., a predominantly UHF area, encouraged "the larger and more effective use of radio in the public interest" (47 U.S.C. Sec. 303(g)).

2. Only in the event the foregoing question is answered in the negative is petitioner in a position to complain of the reassignment of Channel 2 elsewhere, and to raise the issue whether the reassignment of Channel 2 to St. Louis and Terre Haute contravened Section 307(b) of the Communications Act (47 U.S.C. Sec. 307(b)).

STATUTE INVOLVED

Section 303(g) of the Communications Act of 1934, as amended (47 U.S.C. Sec. 303(g)), provides:

> Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—
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> . . . . . .
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest; . . .

STATEMENT

The instant petition for certiorari, filed by a defeated applicant for Channel 2 in Springfield, Ill. (whose appeal from a decision of the Federal Communications Commis-

sion preferring another applicant is still pending in the court below),[1] arises from the Commission's Report and Order released March 1, 1957 (22 FCC Reports 318; J.A. 183-209) "deintermixing" Springfield, Ill., St. Louis, Mo. and Terre Haute, Ind.—by removing VHF Channel 2 from Springfield (a predominantly UHF area) and substituting UHF Channels 26 and 36 therefor, and reassigning VHF Channel 2 to St. Louis and Terre Haute (predominantly VHF areas). That Report and Order, as reaffirmed by the Commission on rehearing (J.A. 240-256), has in turn its antecedents which explain and (respondent believes) justify the action here challenged:

In its spectrum allocation report in 1945 the Commission made it clear that the 13 VHF channels (later reduced to 12), which it there set aside for commercial television use, were insufficient to provide a nationwide competitive television system, and accordingly reserved a substantial portion of the UHF band for *experimental* television purposes.[2] In its Sixth Report of April 14, 1952, issued after a four-year study (1948-1952), the Commission added 70 UHF channels (Channels 14 through 83) to the 12 VHF channels (Channels 2 through 13) theretofore set aside for regular television broadcast use.[3] Basic to this report, allocating specific channels to named cities (see 1 RR ¶ 53:606), was the assumption (then justified but disproved by subsequent developments) that the "intermixture" and utilization of VHF and UHF channels in the same major markets would compel the manufacture of nothing but all-channel receivers (para. 189), and that the new UHF channels would thus become in due course

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[1] See Petition, p. 7, fn. 10.

[2] Report in FCC Docket No. 6651, Mimeo 82387, May 1945 (see 1 Pike and Fisher, *Radio Regulation*, Pt. III, pp. 91:97-98, hereinafter cited as —— RR ——).

[3] See Sixth Report of April 14, 1952, I RR Pt. III, 91:606-607 (para. 22).

"an integral part of a *single*, nationwide television service" (para. 197).[4]

Pursuant to the intermixture policy thus embodied in its 1952 Report, the Commission allocated three VHF channels (Channels 4, 5 and 11) and three UHF channels (Channels 30, 36, and 42) to St. Louis, Mo., one VHF (Channel 2) and one UHF (Channel 20) to Springfield, Ill., and one VHF (Channel 10) and one UHF (Channel 63) to Terre Haute, Ind. for commercial use.

A VHF-UHF pattern soon developed in these three markets typical of the United States as a whole: With the advent of a *second* VHF station in the large St. Louis market, two UHF stations in that area ceased to operate; with a VHF station going on the air first, the UHF channel "went begging" in the smaller Terre Haute market; and with a UHF station commencing operation ahead of the VHF applicants (delayed by a comparative hearing) Station WICS on UHF Channel 20 provided a satisfactory television service in Springfield, Ill. (see J.A. 65, 66, 69). It thus became apparent (under the 1952 "intermixture" policy) that in the larger markets with the advent of a *second* VHF operation, and in the smaller markets with the advent of a *first* VHF station, the UHF stations were ceasing to provide a television service (see J.A. 76-78, 79-88). In short, unless corrective steps were taken, it was evident that the 70 UHF channels would go to waste (see J.A. 63-75).

Accordingly, commencing in 1954, the Commission was flooded with petitions proposing a basic change in allocation philosophy—from that of "intermixture" to a policy of "deintermixture"—in which it was urged (see J.A. 84-85) that ungranted VHF channels in areas where UHF had proved successful be shifted to VHF areas where

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[4] Sixth Report of April 14, 1952, 1 RR Pt. III, 91:661-665. Emphasis supplied throughout this brief.

UHF stood no chance of gaining a toehold, thereby ensuring more service from UHF stations (in UHF areas) and more service from VHF stations (in VHF areas). Among such petitions was one by respondent Plains Television Corporation, licensee of Station WICS, asking that Springfield be made all-UHF and that Channel 2 be reassigned to St. Louis and Terre Haute (see 13 RR 1522, 1525; cf. J.A. 21-26).

After a series of rule-making proceedings, the Commission finally concluded in its Second Deintermixture Report of June 26, 1956 in Docket No. 11532 (13 RR 1571) that intermixture was not producing an integrated television system, that the 12 VHF channels were insufficient for a "fully competitive television system" (13 RR 1571, 1575, para. 12), that VHF operations were thwarting the development of a satisfactory service on UHF in a number of markets, and "that the intermixture of UHF and VHF channels was, on a nation-wide basis, a failure."[5] Pending a further study of the advisability and feasibility of moving all television into the UHF band (thus eliminating the intermixture problem), the Commission also concluded (as an interim measure) that it would re-examine its 1952 allocations with a view to determining, on a case-to-case basis, whether the deletion of VHF channels in predominantly UHF areas would "improve the opportunities for effective competition among a greater number of stations" (13 RR 1571, 1581, para. 31). To that end the Commission, concurrently with its June 26, 1956 Report, instituted some 13 rule-making proceedings designed to "deintermix" a number of areas where it appeared that UHF (if not smothered by VHF competition) would provide a satisfa tory

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[5] See *Jacksonville Journal Co.* v. *Federal Communications Commission*, 101 U.S. App. D.C. 12, 13, 246 F.2d 699, 700 (1957). By 1956 there was "near unanimity" among responsible segments of the industry that "intermixture" had proved a mistake, and that a policy of "deintermixture" should be substituted therefor. See J.A. 85.

service (see 13 RR 1571, 1583-1584). Among the proceedings thus instituted was one (Docket No. 11747) to remove VHF Channel 2 from Springfield, substituting two additional UHF channels therefor and utilizing Channel 2 in St. Louis, a market obviously destined to become all-VHF and in need of additional television service (J.A. 1-2).

In an interim report released July 23, 1956, the Senate Committee on Interstate and Foreign Commerce (which had been closely following the UHF-VHF deintermixture problem) strongly endorsed the Commission's action in Docket No. 11532 and urged the Commission to implement the conclusions there reached by a speedy disposition of the individual proceedings which the Commission had instituted with a view to deintermixing particular markets (J.A. 79-88).

After a careful study of the voluminous comments filed by interested persons in Docket No. 11747, the Commission on March 1, 1957 released a Report and Order (22 FCC Reports 318) in which it found (in line with the five criteria spelled out in its Second Deintermixture Report) that the deletion of Channel 2 from Springfield would not result in any significant numbers of people being deprived of a television service (J.A. 189-190, para. 11); that several stations were providing a UHF service to the area (including Station WICS in Springfield and Station WTVP in Decatur, some 37 miles from Springfield) (J.A. 188-189, para. 8); that 85%-100% of the sets in the nine counties around Springfield were capable of receiving UHF signals (J.A. 189, para. 9); that the flat terrain of central Illinois was ideally suited to UHF propagation (J.A. 189, para. 10); and that the deletion of Channel 2 would result in more service rather than less service in the Springfield-Decatur area (J.A. 198-199, para. 24). The Commission accordingly concluded that the public interest would be served (1) by deleting Channel 2 from Springfield and making that market all-UHF; and (2) by reassigning

Channel 2 to both St. Louis (where it would provide a needed fourth service) and to Terre Haute (where it would provide a second competitive service) (J.A. 183-209). Following the denial by the Commission of a petition for rehearing (J.A. 240-256), Sangamon Valley Television Corporation petitioned the court below for review under 47 U.S.C. Sec. 402(a), raising a single issue whether the Commission's action "deintermixing" Springfield-St. Louis-Terre Haute contravened Section 307(b) of the Communications Act of 1934 as amended (47 U.S.C. Sec. 307(b)).

American Broadcasting-Paramount Theatres, Inc. (ABC), a television network which has been handicapped by its inability to obtain outlets comparable to those enjoyed by the other two television networks (National Broadcasting Company and Columbia Broadcasting System), and which supported the Commission's proposals to provide additional service in key markets through "deintermixture," including the Springfield-St. Louis-Terre Haute proposal (Docket No. 11747), intervened in the court below (pursuant to 5 U.S.C. Sec. 1938), contending that the action deleting Channel 2 from Springfield (even if it had not been reassigned elsewhere) was in the public interest, under Section 303(g), and implemented rather than contravened Section 307(b) of the Communications Act (47 U.S.C. Secs. 303(g) and 307(b)). From a per curiam affirmance of the Commission's action Sangamon seeks certiorari.

ARGUMENT

I.

American Broadcasting-Paramount Theatres, Inc. is the owner and operator of a nationwide television network (ABC). Its network programs are made available to viewers in various parts of the United States through its owned-and-operated stations in five major markets and

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IN THE

Supreme Court of the United States

October Term, 1958

No. 242

WIRL TELEVISION COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ILLIWAY TELEVISION, INC.; WMBD, INC.; TELE-VIEWS NEWS COMPANY, INC.; AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.; WEST CENTRAL BROADCASTING COMPANY; HILLTOP BROADCASTING COMPANY; and MID ILLINOIS TELEVISION COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to The United States Court of Appeals for The District of Columbia Circuit

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BRIEF FOR AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC. IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Petitioner's App. A)[1] is reported at 253 F.2d 863. The actions of the Federal Communications Commission there affirmed (J.A. 109-128;

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[1] In reprinting the opinion below as Appendix A to the Petition for Certiorari, petitioner (without offering any explanation therefor) has omitted the court's explanatory footnotes.

J.A. 128-130; J.A. 131-137) are reported, respectively, in 22 FCC Reports 342 (1957), 11 Pike and Fisher, Radio Regulation,[1] 533, 607-608 (1956), and 22 FCC Reports 1039 (1957).

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1958. A petition for rehearing was denied May 5, 1958. The petition for certiorari was filed on July 30, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1), and 47 U.S.C. Sec. 402(j).

QUESTIONS PRESENTED

1. Whether the action of the Federal Communications Commission, deleting VHF Channel 8 and substituting UHF channels therefor in Peoria, Ill., a predominantly UHF area, encouraged "the larger and more effective use of radio in the public interest" (47 U.S.C. Sec. 303(g)).

2. Only in the event the foregoing question is answered in the negative is petitioner in a position to complain of the reassignment of Channel 8 elsewhere, and to raise the issue whether the allocation of Channel 8 to Rock Island-Davenport-Moline contravened Section 307(b) of the Communications Act (47 U.S.C. Sec. 307(b)).

3. Whether petitioner, who received a construction permit for Channel 8 in Peoria conditioned on the outcome of a rule-making proceeding then pending to delete Channel 8, was improperly refused an evidentiary hearing.

STATUTE INVOLVED

Section 303(g) of the Communications Act of 1934, as amended (47 U.S.C. 303(g)), provides:

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[1] Hereinafter cited as —— RR ——.

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

. . . . .

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest; . . .

STATEMENT

The instant petition for certiorari stems principally from a Report and Order of the Federal Communications Commission, released March 1, 1957 (22 FCC Reports 342; J.A. 109-128) "deintermixing" Peoria, Ill.—by removing VHF Channel 8 from Peoria (a predominantly UHF area) and substituting UHF Channels 25 and 31 therefor, and reassigning VHF Channel 8 to Rock Island-Davenport-Moline (a predominantly VHF area). That Report and Order, as clarified on rehearing by Memorandum Opinion and Order adopted June 20, 1957 (23 FCC Reports 61), has in turn its antecedents which explain and (respondent believes) justify the actions here challenged, including the Commission's earlier decision granting Channel 8 to petitioner conditioned on the outcome of a then-pending proceeding to shift Channel 8 to the Rock Island area (J.A. 128-130, 11 RR 533, 607-608; J.A. 131-137, 22 FCC Reports 1039):

In its spectrum allocation report in 1945 the Commission made it clear that the 13 VHF channels (later reduced to 12), which it there set aside for commercial television use, were insufficient to provide a nationwide competitive television system (see J.A. 10, 13-14), and accordingly reserved a substantial portion of the UHF band for *experimental* television purposes.[1] In its Sixth Report of April 14, 1952, issued after a four-year study

[1] Report in FCC Docket No. 6651, Mimeo 82387, May 1945 (see 1 RR, Pt. III, pp. 91:97-98.

(1948-1952), the Commission added 70 UHF channels (Channels 14 through 83) to the 12 VHF channels (Channels 2 through 13) theretofore set aside for regular television broadcast use (J.A. 13-14).[2] Basic to this latter report, allocating specific channels to named cities (see 1 RR ¶53:606), was the assumption (then justified but disproved by subsequent developments) that the "intermixture" and utilization of VHF and UHF channels in the same major markets would compel the manufacture of nothing but all-channel receivers (para. 189), and that the new UHF channels would thus become in due course "an integral part of a *single,* nationwide television service" (para. 197).[3]

Pursuant to the intermixture policy thus embodied in its 1952 Report, the Commission allocated one VHF (Channel 8) and two UHF channels (Channels 19 and 43) to Peoria, Ill., and two VHF (Channels 4 and 6) and two UHF channels (Channels 36 and 42) to Davenport-Rock Island-Moline for commercial use.

A VHF-UHF pattern developed in these two markets typical of the United States as a whole: In Peoria, with Channel 8 tied up in a comparative hearing, the two UHF stations went on the air in that market and provided the public with a satisfactory television service on UHF (J.A. 113-115, paras. 11-13). In Rock Island-Davenport-Moline, with two VHF stations already established, the UHF channels "went begging" (J.A. 123, para. 27). It soon became apparent (under the 1952 "intermixture" policy) that in the larger markets where *two* VHF stations were in operation, and in the smaller markets with the advent of a *first* VHF station, the UHF channels were not being utilized (see J.A. 47-48; J.A. 77-81). In short, unless cor-

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[2] See Sixth Report of April 14, 1952, 1 RR Pt. III, 91:606-607 (para. 22).

[3] Sixth Report of April 14, 1952, 1 R.R. Pt. III, 91:661-665. Emphasis supplied throughout this brief.

rective steps were taken, it was evident that the 70 UHF channels would go to waste (see J.A. 47-48).

Accordingly, commencing in 1954, the Commission was flooded with petitions proposing a basic change in allocation philosophy—from that of "intermixture" to a policy of "deintermixture"—in which it was urged that ungranted VHF channels in areas where UHF had proved successful be shifted to VHF areas where UHF stood no chance of gaining a toehold, thereby ensuring more service from UHF stations (in UHF areas) and more service from VHF stations (in VHF areas). Among such petitions were those by the two UHF stations in Peoria, asking that Peoria be made all-UHF and that Channel 8 be reassigned to the Rock Island area (see J.A. 79).

After a series of rule-making proceedings, the Commission finally concluded in its Second Deintermixture Report of June 26, 1956 in FCC Docket No. 11532 (J.A. 5-44; 13 RR 1571) that intermixture was not producing an integrated television system, that the 12 VHF channels were insufficient for a "fully competitive television system" (J.A. 10, para. 12), that VHF operations were thwarting the development of a satisfactory service on UHF in a number of markets, and that "the intermixture of UHF and VHF channels was, on a nation-wide basis, a failure" [1] Pending a further study of the advisability and feasibility of moving all television into the UHF band (thus eliminating the intermixture problem), the Commission also concluded (as an interim measure) that it would re-examine its 1952 allocations with a view to determining, on a case-to-case basis, whether the deletion of VHF channels in predominantly UHF areas would "improve the opportunities for effective competition among a greater number

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[1] See *Jacksonville Journal Co.* v. *Federal Communications Commission*, 101 U.S. App. D.C. 12, 13, 246 F.2d 699, 700 (1957).

of stations" (J.A. 21, para. 31). To that end the Commission, concurrently with its June 26, 1956 Report, instituted some 13 rule-making proceedings designed to "deintermix" a number of areas where it appeared that UHF (if not smothered by VHF competition) would provide a satisfactory service (see J.A. 23-24). Among the proceedings thus instituted was one (FCC Docket No. 11749) to remove VHF Channel 8 from Peoria, substituting two additional UHF channels therefor, and utilizing Channel 8 in the Rock Island area, an important market which would otherwise be limited to two stations (J.A. 44-45).

In an interim report released July 23, 1956, the Senate Committee on Interstate and Foreign Commerce (which had been closely following the UHF-VHF deintermixture problem) strongly endorsed the Commission's action in FCC Docket No. 11532 and urged the Commission to implement the conclusions there reached by a speedy disposition of the individual proceedings which the Commission had instituted with a view to deintermixing particular markets. Sen. Rept. No. 2769, 84th Cong. 3d Sess.

American Broadcasting-Paramount Theatres, Inc. (ABC), a television network which has been handicapped by its inability to obtain "outlets" in two-station markets, comparable to those enjoyed by the other two networks (CBS and NBC), supported the Commission's rule-making proposal (FCC Docket No. 11749) to provide at least three stations (on UHF) in Peoria and at least three stations (on VHF) in the Rock Island-Davenport-Moline area (J.A. 112, para. 9).

After a careful study of the voluminous comments filed by interested persons in FCC Docket No. 11749, the Commission on March 1, 1957 released a Report and Order (J.A. 109-128; 22 FCC Reports 342) in which it found (in line with the five criteria spelled out in its Second Deintermixture Report) that the deletion of Channel 8 from Peoria would not result in any significant numbers of

people being deprived of a television service (J.A. 117, para. 17); that several stations were providing a UHF service to the area, including two stations in Peoria (J.A. 113-114, para. 11); that virtually 100% of the sets in the Peoria area were capable of receiving UHF signals (J.A. 114, para. 12); that the flat terrain of central Illinois was generally suited to UHF propagation (J.A. 115, para. 13); and that the deletion of Channel 8 would result in more service rather than less service in the Peoria market (J.A. 123-124, para. 29). The Commission accordingly concluded that the public interest would be served (1) by deleting Channel 8 from Peoria and substituting two UHF channels therefor, thus making that market all-UHF; and (2) by reassigning Channel 8 to Rock Island-Davenport-Moline (where it would provide a needed third service) (J.A. 123, para. 27).

On March 26, 1957, WIRL Television Company (which in the meantime, after a comparative hearing, had received a grant on Channel 8 in Peoria *subject to* the outcome of the then-pending rule-making proceeding to substitute a UHF channel therefor) sought review in the court below of the March 1 Report and Order (J.A. 109-126) under 47 U.S.C. Sec. 402(a) (Case No. 13768) and under 47 U.S.C. Sec. 402(b) (Case No. 13769). By Memorandum Opinion and Order released May 17, 1957 (J.A. 131-137; 22 FCC Reports 1039), the Commission (1) denied a petition for reconsideration theretofore filed in the comparative proceeding by WIRL Television Company (objecting to the conditions which the Commission had attached to the Channel 8 grant) and (2) granted WIRL Television Company a permit for Channel 25 in Peoria (J.A. 136). From that action, WIRL Television Company took a third appeal (Case No. 13912) on May 31, 1957, under 47 U.S.C. Sec. 402(b). By Memorandum Opinion and Order adopted June 20, 1957 (23 FCC Reports 61) the Commission reaffirmed its Report and Order of March 1, 1957 in Docket No. 11749, by denying a peti-

tion for reconsideration timely filed (under 47 U.S.C. Sec. 405) by another party to that proceeding.

Pursuant to 5 U.S.C. Sec. 1038 and 47 U.S.C. Sec. 402(e), respondent American Broadcasting-Paramount Theatres intervened in each of the three appeals in the court below. Although supporting the Commission's actions on the merits, ABC contended that WIRL's appeals challenging the rule-makinng action deleting Channel 8 from Peoria had been rendered premature by the petition for reconsideration timely filed by another party to that proceeding (with no appeal filed by WIRL subsequent to the denial of that petition for rehearing on June 20, 1957)—in view of express language which Congress added to 47 U.S.C. Sec. 405 in 1952, namely, that the 30-day period in which review (under 47 U.S.C. Sec. 402) *must* be filed or taken "*shall* be computed from the date upon which public notice is given of orders disposing of *all* petitions for rehearing filed in any case." The court below affirmed, without adverting to the jurisdictional question thus interposed.

ARGUMENT

I.

Proceeding in 1952 on the assumption (then by no means unjustified) that the allocation of VHF and UHF channels to the same markets would compel the manufacture of nothing but all-channel receivers, the Commission in its Sixth Report allocated both UHF and VHF channels in as many markets as possible.[1] But subsequent developments soon demonstrated that in smaller markets to which a single VHF channel was allocated, and in the larger markets where two VHF channels were in use, the 70 UHF channels were becoming "paper allocations" (see J.A. 8-9, 47-48, 78-80). Since the 12 VHF channels were

[1] Sixth Report of April 14, 1952, 1 RR Pt. III, 91:661-665.

inadequate by themselves to provide a nationwide competitive television service (J.A. 10; 13 RR 1571, para. 12), it was unthinkable that the 70 UHF channels should be allowed to go to waste. See Sen. Rept. No. 2769, 84th Cong. 3d sess.

Thus confronted with a situation where there were not enough VHF channels to go around, and with UHF channels not being utilized, it took no great acumen in 1956 to conclude, with 82 channels to work with, that the public would receive service from more stations if equally competitive UHF channels were used in areas where UHF was providing a satisfactory service, and if the VHF channels theretofore assigned to those areas (but still tied up in comparative hearings) were shifted to VHF markets where UHF had been unable to obtain a foothold. The Commission so concluded in its Second Deintermixture Report released June 26, 1956 in FCC Docket No. 11532 (J.A. 5-44; 13 RR 1571).

In line with that Report, the Commission instituted proceedings to deintermix the Peoria and Rock Island areas (FCC Docket No. 11749)—by removing Channel 8 from Peoria (substituting UHF channels therefor), and by reassigning Channel 8 to Rock Island, a market restricted to two stations (J.A. 46-47). On the basis of data there submitted, the Commission found that by removing Channel 8 from Peoria and substituting UHF channels therefor, and by reassigning Channel 8 to Rock Island-Davenport-Moline, each of those markets would have additional stations: Peoria would have three or more stations (on UHF), instead of a single station on VHF Channel 8; Rock Island-Davenport-Moline would have three commerial stations instead of two (J.A. 118, para. 18; J.A. 123-124, para. 29).

Despite the public interest benefits which would thus stem from deintermixing Peoria, petitioner argues (Pet. 13-21) that the Commission was foreclosed as a matter of law from taking the action which it did by reason of

Section 307(b) of the Communications Act (47 U.S.C. Sec. 307(b)). Notwithstanding the admitted fact that the 12 VHF channels are not enough to provide a nationwide competitive television system, and notwithstanding the fact that UHF channels become "paper allocations" in markets the size of Peoria, when a VHF station commences operating therein, petitioner says (in effect) that a VHF channel must be assigned to Peoria by reason of Section 307(b), regardless of the public interest consequences and even though such an allocation results in less service rather than more service (Pet. 13-21).

Neither the Communications Act nor this Court's decisions impose any such "straitjacket" on the Commission. Section 303(g) of the Communications Act places upon the Commission the responsibility of encouraging "the larger and *more effective use* of radio in the public interest" (47 U.S.C. Sec. 303(g)). Here, the Commission found as a fact, fully supported by the record, that the deletion of the Channel 8 assignment in Peoria would result in more stations and more service in central Illinois (Peoria-Springfield-Decatur) than would its retention in that area (J.A. 113-114, para. 11; J.A. 117-118, para. 18; J.A. 123-124, para. 29). Accordingly, under the express authority contained in Section 303(g) of the Communications Act (47 U.S.C. Sec. 303(g)), the Commission was fully justified in deleting from Peoria the VHF channel which had been allocated to that market in 1952 on an assumption (since disproved) that VHF and UHF stations could exist side by side in the same market. *Second Report on Deintermixture,* 13 RR 1571 (1956). The Commission's action deleting Channel 8 from Peoria was fully warranted, if for no other reason than to improve the number of competitive television services in and around Peoria (central Illinois) even though the deleted VHF channel had been placed "on ice" without reassigning it elsewhere—as the Commission did in the *Vail Mills* and *Elmira* cases decided at the same time. 22 FCC Reports 293 (1957); 22 FCC Reports 307 (1957).

Petitioner is aggrieved by the action *deleting* Channel 8 from Peoria, and *not by its reassignment elsewhere.* What use is made of Channel 8, in the event the public interest (as the Commission found) would be better served by its non-utilization in the Peoria area, is of no moment to petitioner. Technically speaking, therefore, petitioner is in no position to raise a Section 307(b) question (based on the comparative needs of Peoria and Rock Island-Davenport-Moline), in view of the Commission's finding that the non-utilization of Channel 8 in Peoria would result in more service rather than less srvice in that area (J.A. 118, para. 18).

II.

But even assuming *arguendo* that petitioner is in a position to invoke Section 307(b), in view of the fact that the benefits which would accrue from the utilization of Channel 8 elsewhere was used by the Commission as an *additional* reason why Channel 8 should not remain in Peoria (J.A. 119, para. 20), the action here challenged implements rather than contravenes the Communications Act, including Section 307(b). An intermixed system of channel allocations where the net effect of a single VHF operation is to close down multiple UHF stations does not constitute an "*efficient,* and equitable distribution of *radio service*" within the meaning of Section 307(b) of the Communications Act (47 U.S.C. Sec. 307(b)). UHF "paper allocations" do not constitute "radio service."

The Commission's authority, by prior rule-making proceedings to set aside one class of frequencies for "communities" of one type and a different class of frequencies for "communities" of another type has long been recognized. See *Huntington Broadcasting Co.* v. *Federal Communications Commission,* 89 U.S. App. D.C. 222, 192 F.2d 33 (1951). Thus, the Commission properly decided in FCC Docket No. 11532 (by its Second Report on Deintermixture) to make greater use of UHF channels in areas where

UHF is providing satisfactory service, and to shift VHF channels from such areas to VHF markets where UHF cannot hope to provide a competitive service (J.A. 21-24; 13 RR 1571). To that end, in the instant proceeding, it first decided to make Peoria all-UHF—by deleting Channel 8 in that area (J.A. 118, para. 18). But rather than allow the channel to go to waste, it was placed in a VHF area (Rock Island-Davenport-Moline) which was in need of additional service and where UHF "paper" allocations were not providing "radio service" (J.A. 123, para. 27).

In short, by deleting Channel 8 in Peoria (and substituting UHF channels therefor) and by reassigning that channel to Rock Island-Davenport-Moline), such action meant that Peoria would have three or more commercial stations (instead of one), and Rock Island-Davenport-Moline would have a third competitive service. In thus providing more television service to the public in those areas and more effective competition among all three networks, the Commission's action implemented rather than contravened the requirements of Sections 303(g) and 307(b) of the Act (47 U.S.C. Secs. 303(g) and 307(b)). This Court's decisions in the *Nelson Brothers, Allentown,* and *Sanders* cases, on which petitioner relies (Pet. p. 14), dealt with an entirely different problem and are in no way in conflict with the decision below.

III.

When, on June 26, 1956, the Commission released its Second Report on Deintermixture and decided to institute rule-making proceedings to deintermix 13 markets (J.A. 5-44, 13 RR 1571), petitioner had no vested rights in Channel 8 in Peoria. At that juncture petitioner was still an applicant for that frequency. Accordingly, with a rule-making proceeding pending looking toward the deletion of Channel 8 from Peoria and substituting UHF channels therefor (FCC Docket 11749), the Commission

on June 29, 1956, when it issued a decision preferring petitioner over its competitor in Peoria, granted Channel 8 to WIRL Television Company subject to the condition "that the Commission may, without further proceedings, substitute for Channel 8 such other channel as may be assigned to Peoria, Illinois instead of Channel 8 in the rule-making proceedings in Docket No. 11749, and subject to the further condition that no construction shall be commenced under the permit here granted until further order of the Commission to be issued subsequent to the conclusion of Docket No. 11749" (J.A. 129-130). Having concluded in Docket No. 11749 (J.A. 109-128) to delete Channel 8 and to substitute UHF Channels 25 and 31 therefor, the Commission on May 17, 1957 granted Channel 25 to petitioner (J.A. 136).

Section 303(r) of the Communications Act (47 U.S.C. Sec. 303(r)) empowers the Commission to "prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." Since the court will not "direct the order in which the Commission shall consider its cases,"[1] the Commission could have withheld action in the Channel 8 comparative hearing until the reallocation proceeding (Docket No. 11749) was resolved. It chose instead, for public interest reasons (J.A. 129-130), to resolve the Channel 8 comparative proceeding, but to condition its grant on the outcome of the reallocation proceeding. With such a condition attached to the grant, petitioner was not a "licensee" or "permittee" entitled to an evidentiary hearing under 47 U.S.C. Sec. 303(f) and 316 before its conditioned permit could be modified to specify the channel ultimately allocated to Peoria in lieu of Channel 8. Petitioner held a grant on Channel 8 expressly subject to the outcome of the deintermixture rule-making proceeding. Its comments

[1] *Federal Communications Commission* v. *Station WJR*, 337 U.S. 265, 272.

in that proceeding were duly considered by the Commission. Having had at no time an unconditioned license or permit for Channel 8, it cannot demand an "evidentiary hearing" under Section 303(f) and 316 of the Act. Thus, the Commission was free to determine what channels should be utilized in Peoria by rule-making proceedings, rather than by an evidentiary hearing. *Logansport Broadcasting Corp* v. *United States,* 93 U.S. App. D.C. 342, 210 F.2d 24 (1954).

CONCLUSION

The Commission's action here challenged was properly affirmed by the court below. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 29, 1958

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No. 242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

WIRL TELEVISION COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA

and

FEDERAL COMMUNICATIONS COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION OF WEST CENTRAL BROADCASTING COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 242

WIRL TELEVISION COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF WEST CENTRAL BROADCASTING COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

West Central Broadcasting Company (referred to herein as "West Central") intervened in the proceedings in the Court below and is one of the Respondents here. It opposes the Petition for Writ of Certiorari

of WIRL Television Company filed in this Court on July 30, 1958.

The statement of the "Questions Presented" and the "Statement of the Case" set out in the Petition are not accurate and are not accepted by Respondent West Central. Since the statement of such matters set forth in the Brief in Opposition of the Government are acceptable to it, this Respondent adopts that statement for purposes of this Brief, and will proceed directly to a statement of the reasons why the Writ of Certiorari prayed for should not be granted.

ARGUMENT

Each of the questions presented for review here by Petitioner was presented to and passed upon by the Court below. Three of these questions, namely, whether the reallocation of television channels ordered by the Commission in the Peoria and Tri-Cities areas was consistent with Section 307(b) of the Communications Act; whether such action was arbitrary or discriminatory; and whether Petitioner was entitled to a full evidentiary hearing prior to the reallocation, were specifically considered and ruled upon in the Decision below (253 F(2d) 863), affirming the Commission's orders. As pointed out in the Government's Brief in Opposition, the Court below was clearly correct in its disposition of these questions, and the Petition makes no new showing with respect to them sufficient to support the granting of certiorari (Rule 19).

Petitioner also sought unsuccessfully to raise in the Court below the fourth question advanced in its present Petition, the gravamen of which is the charge that a United States Senator, Robert S. Kerr, majority stockholder in the corporate licensee of one of the

Peoria UHF television stations, produced a reallocation of TV channels to the benefit of that station "through his influence, power, and prestige as a United States Senator" (Petition, pp. 3-4). This charge of Senatorial and Commission misconduct was summarily and properly disposed of in the Court below since it is completely unsubstantiated either in or outside the record.

In its lengthy argument (Petition, pp. 32-38), Petitioner cites nothing *in the record* to support its unwarranted, improper and, indeed, reckless charges. Moreover, it cites nothing *outside the record*—and it could not do so—which would lend any support to its claims. The only facts correctly recited by Petitioner are: (1) that a United States Senator, Robert S. Kerr, is a stockholder of the licensee of one of the two UHF stations operating in Peoria, and (2) that the Senate Committee on Interstate and Foreign Commerce (of which Senator Kerr is not, and was not at the time, a member) held extensive hearings on the UHF problem. But Petitioner is clearly wrong in seizing upon these two isolated facts as a basis for its wild speculations of official misconduct, since there is simply no connection between them and the Commission's action amending its TV channel allocation rules. Petitioner is not even correct in asserting (Petition, p. 34) that the Senate Finance Committee, of which Senator Kerr is a member, has supervisory power over the appropriations of the Federal Communications Commission (Cong. Directory, January, 1956, Ed. pp. 227, 266; Rule XXV(h), Standing Rules of the Senate, 60 Stat. 812, 817). Further, contrary to the implication sought to be raised (Petition, pp. 32, 34), none of the pleadings submitted to the Federal Communica-

tions Commission by West Central in any of the Peoria deintermixture proceedings were personally signed or filed by Senator Kerr and, in fact, he did not personally participate in any phase of the proceedings.

In summary, the Petition utterly fails to support the charges of improper influence, violations of public trust, and the other accusations so recklessly and indiscriminately flung about by Petitioner. These allegations and charges have no foundation in fact and are based solely upon unwarranted speculations, conceived in the fertile mind of Petitioner.

CONCLUSIONS

The decision below is correct and no important issue warranting further review by this Court is presented. Since no basis for granting certiorari has been shown by Petitioner, the Petition for a Writ should be summarily denied.

Respectfully submitted,

JACK P. BLUME,
Attorney for Respondent

Dated: August, 1958

Certificate of Service

I, Jack P. Blume, hereby certify that a true and correct copy of the Brief in Opposition of West Central Broadcasting Company was sent this 29th day of August, 1958, by first class mail, postage prepaid, to the following:

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In the Supreme Court of the United States

OCTOBER TERM, 1958

WIRL TELEVISION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. A) is reported at 253 F. 2d 863. Two of the three underlying decisions and orders of the Federal Communications Commission are reported at 22 F.C.C. 342 and 22 F.C.C. 1039; the third has not been officially reported but is unofficially reported at 11 Pike & Fischer, Radio Regulation 533.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the

action of the Commission, was entered on March 27, 1958. Rehearing was denied on May 5, 1958. The petition for a writ of certiorari was filed on July 31, 1958. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1) and 47 U.S.C. 402(j).

QUESTIONS PRESENTED

1. Whether the Commission's action, reassigning television channels in the Peoria and Davenport-Rock Island-Moline areas of Illinois and Iowa in order to improve the opportunities for service among a greater number of stations in those areas, comports with Section 307(b) of the Communications Act.

2. Whether the Commission's action in reassigning such television channels is otherwise reasonable and proper under the public interest standard of the Communications Act.

3. Whether the Commission, having granted petitioner a conditional construction permit for Peoria Channel 8 which provided that the Commission might without further proceedings substitute another channel as a result of pending rule-making proceedings, was nevertheless required by Sections 303(f) and 316(a) of the Communications Act to accord petitioner a full evidentiary hearing prior to making such substitution.

STATUTES INVOLVED

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*) are set forth in the appendix to the petition, pp. 7a-9a.

STATEMENT

The Federal Communications Commission on March 1, 1957, after full rule-making proceedings, amended Section 3.606 of its Rules, comprising a nationwide allocation of television channels, by transferring a very high frequency (VHF) channel 8 from Peoria, Illinois, to the Tri-City area of Iowa and Illinois (Davenport-Rock Island-Moline) and by adding ultra high frequency (UHF) channels 25 and 31 to those already available in Peoria (22 F.C.C. 342, 22 F.R. 1489). As a result of this action, Peoria—which previously had been assigned one VHF channel and three UHF channels (one of which was reserved for non-commercial educational use)—was now assigned five channels, all in the UHF portion of the television band, of which one remained reserved. At the same time, the Tri-City area—previously assigned two VHF channels on which stations were operating and a number of UHF channels on which no station had ever operated—was now provided with a third commercial VHF channel.

The action of the Commission, in shifting VHF and UHF channels in the Peoria and Tri-City areas, was one of some nine actions taken on the same date in rule-making proceedings instituted on June 26, 1957, for the purpose of improving opportunities for competition among a greater number of stations in individual communities by deleting VHF channels in established UHF markets and/or by adding VHF channels in predominantly VHF markets.[1] These proceedings stemmed

[1] Another of these rule-making actions involving channel reassignments in Springfield, Ill., St. Louis, Mo. and Terre Haute, Ind. is now pending before the Court on petition for a writ of certiorari in *Sangamon Valley Television Corp.* v. *United States, et al.*, No. 235, this Term.

from a general allocation proceeding, terminated on June 26, 1956 (21 F.R. 4958), in which the Commission concluded that pending a study of the feasibility of moving all television broadcasting to the UHF portion of the radio spectrum, competitive opportunities in a limited number of individual communities might be enhanced without substantially impairing television service therein by eliminating the intermixture of VHF and UHF channels in the same community and making some communities all UHF and others, in effect, all VHF. This determination, in turn, was based upon the Commission's conclusion in its June 26, 1956, Report and Order that the disparity between UHF and VHF channels was such that whereas the former could compete successfully with other technically equal UHF channels and provide the viewing public with satisfactory service, direct competition by VHF channels either foreclosed successful UHF operation or seriously jeopardized its continuance.[2]

As a result of this finding that direct competition between VHF and UHF channels was unworkable, the Commission faced a serious problem. Because of the scarcity of VHF channels (12 in number), expansion of the nation's television service is dependent upon discovering some effective way to use the 70 UHF channels. In allocating television channels throughout the nation in 1952, the Commission had believed it was feasible to achieve this end by intermixing VHF and UHF assignments in the same community. Having

[2] The inequality between the two types of channels and the preference of networks, advertisers, and audiences for VHF lies primarily in the facts that UHF transmission covers a smaller area in some terrains and UHF reception requires either a special set or set conversion.

been proved wrong by experience, the Commission gave consideration in its June 26, 1956, Report and Order to other means of assuring an adequate national competitive television structure. The Commission determined that any effort at nationwide "deintermixture," *i.e.*, to make some communities all VHF, others all UHF, would not be a feasible solution. It felt that, in view of the limited number of areas in which UHF was established, a serious public hardship would result from any widespread enforced changeover and that, in view of terrain factors, many rural areas were necessarily dependent on VHF at the existing stage of television equipment development. It concluded that a long range program of shifting all commercial television to the UHF portion of the spectrum might be the best solution to the problem. However, since effectuation of any such plan would require considerable further study and time,[3] the Commission decided that, pending any long range measure, it would take interim action to alleviate the situation and to provide greater television service in a limited number of individual areas where this might be feasible, and it set forth general criteria for determining what areas would be considered appropriate (13 Pike & Fischer, Radio Regulation 1571, 1582).

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[3] Although the Commission decided not to institute any formal rule-making proceeding until after it had an opportunity to study the results of intensive research into the matter by both Government and industry, it has been instrumental in establishing the Television Allocation Study Organization (incorporating representatives of the broadcast stations, both UHF and VHF, the national networks, the electronic manufacturing industry, and the educational broadcasters) and has cooperated fully in its technical studies of the allocation and equipment problems.

In the Peoria rule-making proceeding, the Commission concluded that the public interest would be served by deleting VHF Channel 8 from Peoria, adding it to the Tri-City area, and assigning UHF Channels 25 and 31 to Peoria. The Commission found that the Peoria area was predominantly UHF with several UHF stations providing service to the public, that the terrain was satisfactory for UHF propagation, that the vast majority of sets were equipped for UHF, that additional UHF channels in the lower portion of the spectrum were available to replace VHF Channel 8, that no significant number of people would lose service if that channel were replaced with UHF channels, and that the channel shifts would insure more effective competition among a greater number of stations in Peoria (R. 1005). The Commission also found that the Tri-City area was predominantly VHF, that there was little chance of additional television service in that area unless a VHF channel were to be added, and that Channel 8 would afford a much-needed third local outlet (R. 1005-1006).

On June 26, 1956, when the Peoria rule-making proceeding was instituted, mutually exclusive applications were pending before the Commission in hearing status, including one filed by petitioner for the VHF channel proposed to be deleted in Peoria.[4] On June 29, 1956,

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[4] In addition to Peoria, there were three other communities with respect to which the Commission had initiated rule making to delete a VHF channel while mutually exclusive applications for the channel were pending before the Commission in hearing status: Springfield, Illinois; Hartford, Connecticut; and New Orleans, Louisiana. As in the case of Peoria, the Commission subsequently awarded conditional grants to the winning VHF applicants in these comparative proceedings during the pendency of the rule-

the Commission granted a construction permit for VHF Channel 8 to petitioner, subject to the conditions that no construction could commence under the permit until further order of the Commission in the rule-making proceeding, and that the Commission might "without further proceedings, substitute for Channel 8 such other channel as may be assigned to Peoria, Illinois, instead of Channel 8 in the rule-making proceeding now pending" (R. 1089). The conditional grant was made at that time because of the Commission's belief that, even though the permit issued might never become effective, it was nevertheless in the public interest to inform the competing applicants as to the Commission's choice among them so that they could plan their future actions accordingly (R. 1089).[5]

On July 30, 1956, petitioner petitioned the Commission to reconsider and vacate the conditions attached to its construction permit. The Commission on May 17, 1957, subsequent to its decision in the rule-making proceeding to delete VHF Channel 8, denied petitioner's petition for reconsideration and modified its construction permit for Channel 8 to specify operation on UHF Channel 25.

On appeal, the court of appeals unanimously affirmed the Commission's actions. The court held that the Commission's underlying findings of fact were supported

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making proceedings. See *Sangamon Valley Television Corp.*, 11 Pike & Fischer, Radio Regulation 783, 813-814 (pending before the Court on petition for certiorari. No. 235, this Term); *Travelers Broadcasting Service Corp.*, 12 Pike & Fischer, Radio Regulation 689, 806e; *Loyola University*, 12 Pike & Fischer, Radio Regulation 1017, 1114.

[5] Thus, in Peoria, the losing applicant in the comparative hearing applied for and received a construction permit for one of the new UHF channels, while the case was before the Court of Appeals (see brief of intervenor WMBD, Inc., in the court below).

by substantial evidence, and that the channel reassignments were neither beyond its authority nor an abuse of discretion (Pet. App. A, p. 6a).

The court stated (Pet. App. A, p. 6a):

> The charge of arbitrariness is not well taken. The long range goal of the Commission was to encourage UHF, and removal of potential VHF competition is a rational choice of means to achieve this goal. The short range, or "interim" goal, was to "improve the opportunities for effective competition among a greater number of stations." It was not arbitrary to conclude that the goal would be better approached in Peoria by allotting it four technically equal UHF channels, rather than one superior VHF channel and two inferior UHF channels.

With respect to petitioner's complaint that it received, not the VHF channel it wanted but a UHF channel which it did not want, the court found no error, pointing out that "this situation is a consequence of the Commission's exercise of its rule-making power and its acknowledged authority to impose the conditions which were contained in the grant of the VHF channel 8 permit" (Pet. App. A, p. 6a). Finally, the court considered and rejected without discussion various other contentions raised by petitioner in its briefs and argument to the court, as constituting "no basis for reversing the action of the Commission" (Pet. App. A, p. 6a).

1. Petitioner's contention (Pet. 13-21) that the reassignment of VHF Channel 8 from Peoria to the Tri-City area is violative of Section 307(b) of the Communications Act rests on the misconception that this section requires some specific distribution of VHF channels as such. Section 307(b) merely provides that "the Commission shall make such distribution of . . . frequencies . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of *radio service* to each of the same" (emphasis added). The Commission here determined that Peoria would be provided with a greater amount of television service if it had four technically equal UHF channels rather than one competitively superior VHF channel which would seriously affect the ability of the existing UHF stations to continue in operation and virtually preclude the development of any fourth commercial station. The Commission also found that the Tri-City area, with two established VHF stations, could only obtain a third service through the addition of a new VHF channel, and that the assignment of any number of UHF channels to the area would be of no practical consequence. In deciding to reassign Channel 8 upon the basis of these determinations, the Commission did not replace the standard of Section 307(b) with any novel doctrine of "equalizing competition" to protect particular competitors (R. 1005-1006; 22 F.C.C. 352). Rather it took cognizance of the fact, established in the general rule-making proceeding, that the effect of competition between the two different types of channels was to curtail sharply the amount of television service actually received by the

public in any community where they were intermixed. The objectives of Section 307(b) and the Commission's present action are therefore the same: the distribution of frequencies in the manner best calculated to provide the greatest amount of actual television service to the communities involved. Accordingly, as the court below correctly concluded (Pet. App. A, p. 6a), there is "no basis for saying that the Commission's decision was beyond its authority."[6]

2. Petitioner's further contention (Pet. 21-27) that the Commission, in deleting VHF channels from Peoria and Springfield, Illinois, has arbitrarily discriminated against one area of the country, is factually inaccurate. On March 1, 1957, when the Peoria and Springfield cases were decided, VHF channels were also deleted from Elmira, New York (22 F.C.C. 307), and Hatfield, Indiana (22 F.C.C. 390). More recently, on April 4, 1958, the Commission deleted two VHF channels from Walla Walla, Washington (16 Pike & Fischer, Radio Regulation 1636). Furthermore, the

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[6] There is also no basis for petitioner's assertion (Pet. 14, 20) that the court below ignored the Section 307(b) issue. While the decision does not mention the section in terms, its penultimate paragraph clearly considers the essential points in petitioner's argument on this score. In any event, the final paragraph disposes of petitioner's "other contentions" as being without basis. See also *Sangamon Valley Television Corp.* v. *United States*, 255 F. 2d 191 (C.A.D.C.), pending on petition for certiorari, No. 235, this Term, where the court expressly disposed of a similar Section 307(b) argument. Nor does the decision here conflict with the opinion of this Court in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, or *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U. S. 358, both of which, insofar as they are relevant to the instant case, stand solely for the proposition that, in weighing the assignment of a frequency to one of two communities, the service needs of each must be taken into consideration.

Commission on March 1, 1957, tentatively deleted VHF channels in Evansville, Indiana, and Fresno, California, but, by virtue of Section 316 of the Communications Act, must accord outstanding permittees, who possess unconditioned construction permits, public hearings before these actions can be made final (22 F.C.C. 382 and 365).

In any event, the fact that only a limited number of areas may present appropriate circumstances for interim action by the Commission to provide greater service within the criteria set forth in the Commission's Report and Order of June 26, 1956, does not make such action arbitrary or capricious. *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 202-203; *Coastal Bend Television Co.* v. *Federal Communications Commission*, 234 F. 2d 686, 689-690 (C.A.D.C.); *Jacksonville Journal Co.* v. *Federal Communications Commission*, 246 F. 2d 699, 701-702 (C.A.D.C.). The Commission's refusal to remove VHF channels in other communities is attributable, as the court of appeals found,[7] to the different factual circumstances prevailing in those areas, *e.g.* such factors as terrain, population patterns, number of people who would lack adequate service if the channel were removed, etc.[8] In the instant case, the court of appeals, after careful scrutiny of both

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[7] See *Springfield Television Broadcasting Corp.* v. *Federal Communications Commission*, Case Nos. 14050 and 14051, decided June 19, 1958; *Winnebago Television Corp.* v. *United States*, Case No. 14086, decided July 2, 1958.

[8] Petitioner's evidentiary challenge (Pet. 11, n. 17, 26-27, 39-40) to the Commission's findings that the Peoria terrain is suitable for UHF propagation, and that no significant number of people would lack adequate service if two additional UHF channels were substituted for the one VHF, raises only an issue of fact which the court below resolved adversely to petitioner.

the record and the factors underlying the Commission's decision, found an "adequate legal and factual basis" for the Peoria-Tri-City reassignments and rejected petitioner's "charge of arbitrariness" as "not well taken" (Pet. App. A, p. 6a). Petitioner's renewal of that charge here presents no substantial issue warranting further review by this Court.

3. Equally insubstantial as a basis for certiorari is petitioner's related suggestion (Pet. 25-26, 33-38), also made before the court below, that Peoria was picked for special consideration by the Commission because of some undisclosed improper reason, or because of undue pressure by the Senate Interstate and Foreign Commerce Committee and/or Senator Kerr. Apart from stating that the Senate Committee (upon which Senator Kerr did not sit) held hearings with respect to the UHF-VHF problem, and that a UHF licensee (in which Senator Kerr was a stockholder) filed formal pleadings with the Commission,[9] petitioner does not here—and did not before the court below—support its serious charge of Senatorial and Commission misconduct. The court of appeals "considered" petitioner's unsubstantiated accusation and found "no basis for reversing the action of the Commission" (Pet. App. A, p. 6a). Viewing the lack of substantiation against the manifest reasonableness of the channel reassignments, we submit that the court of appeals did not err.

4. Petitioner's final claim (Pet. 27-32), that the Commission was required to accord it a full evidentiary hearing prior to deleting the VHF and substituting a UHF channel, likewise has no merit. No such

[9] Contrary to petitioner's implied statement (Pet. 32), no pleadings were signed or filed by Senator Kerr personally.

requirement flows from Sections 303(f) and 316(a) of the Communications Act since petitioner never received any outright grant of the VHF channel, but, instead, a permit with an express condition that the Commission might substitute another channel "without further proceedings" (R. 1089). The Commission's "acknowledged authority to impose the conditions which were contained in the grant of the VHF channel 8 permit" (Pet. App. A, p. 6a) was properly sustained by the court below. *Regents* v. *Carroll*, 338 U. S. 586, 600; *Woodmen of the World Life Insurance Co.* v. *Federal Communications Commission*, 105 F. 2d 75, 78 (C.A.D.C.) certiorari denied, 308 U. S. 588. Petitioner's long-time status as an applicant in the Channel 8 comparative proceeding does not alter the fact that no mere applicant has any special rights under either Section 303(f) or 316 of the Act.[10] *Federal Communications Commission* v. *WJR, The Goodwill Station*, 337 U. S. 265, 272; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134; *Coastal Bend Television Co.* v. *Federal Communications Commission*, 234 F. 2d 686 (C.A.D.C.). The circumstance that petitioner received a channel different from that which it sought is without consequence. *Civil Aeronautics Board* v. *State Airlines*, 338 U. S. 572, 575-578.

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[10] Petitioner's argument with respect to Section 2 of the Administrative Procedure Act (5 U.S.C. 1001(e)) was not raised before the court of appeals and is not appropriately before this Court. Furthermore, the argument does not advance petitioner's position, since if the conditional award was void for procedural deficiency, petitioner had no permit of any kind and no greater right than any other applicant to be heard on the channel reassignments.

CONCLUSION

The decision below is correct, no important issue calling for further review by this Court is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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